

Shasta-Scott Watershed Permitting Programs

— Frequently Asked Questions

Regarding the watershed-wide permitting programs for agricultural diverters in the Shasta and Scott River watersheds, the Department of Fish and Game (DFG) is aware of a number of questions being raised by agricultural water diverters in Siskiyou County regarding the Shasta and Scott River Watershed-Wide Permitting Programs. The purpose of this document is to answer some of the most frequently asked questions. We hope you find this information helpful.

Please note that, prior to making a commitment to participate in one of the permitting programs, each diverter will know what will be required in his/her sub-permit. Before signing a sub-permit each diverter will also have an opportunity to review the fee required by the Resource Conservation District (RCD) for participation in the permitting program. The fee is specifically to cover the RCDs' cost to administer and monitor program implementation. Last, if you decide to enroll in one of the permitting programs, you will have the option of relinquishing your permits and withdrawing from the permitting program at any time if you so choose. See questions 12, 13 and 14 for details.

If you have any additional questions regarding the legal requirements for agricultural water diversions in the Scott Valley, please contact Program Supervisor Donna Cobb, at (530) 225-2314 or dcobb@dfg.ca.gov. In Shasta Valley, please contact Staff Environmental Scientist Andrew Jensen, at (530) 225-2378 or ajensen@dfg.ca.gov. For general questions about the Watershed-wide Permitting Programs you may also contact the Shasta Valley RCD at (530) 842-6121 or the Siskiyou RCD at (530) 467-3975.

Sincerely,

Neil Manji, Northern Region Manager
California Department of Fish and Game

1. This seems to be happening so suddenly. What is the history behind the development of these Permit Programs?

- In early 2002, the Salmon and Steelhead Recovery Coalition petitioned the Fish and Game Commission (Commission) to list coho salmon (*Oncorhynchus kisutch*) north of San Francisco as an endangered species under the California Endangered Species Act (CESA). On March 30, 2005, the Commission formally designated coho salmon in northern California as a threatened species.
- As part of this listing process the Commission required that DFG prepare a recovery strategy for coho salmon. DFG convened the Shasta-Scott Recovery Team (SSRT) in late 2002 and began to work on development of a pilot program for the Shasta and Scott River watersheds. Members of the SSRT

were nominated to represent state, federal, and local agencies, affected landowners, individuals with scientific expertise and local interest groups including Save Our Shasta and Scott Valleys (SOSS). The SSRT made it clear that implementation of the pilot program would require that DFG work with community members to develop a programmatic permitting process that would cover routine ranching and farming activities of those agricultural diverters who wanted to be in compliance with the Fish and Game Code. A key objective of the programmatic approach was to provide agricultural diverters a simpler and less costly means to obtain necessary permits than if they were to obtain those permits on their own.

- In February 2004, the Commission adopted the Recovery Strategy for California Coho Salmon (Recovery Strategy), which included the work done by the SSRT for the Scott and Shasta valleys.
- The Watershed-wide Permitting Programs (permitting programs) being developed by DFG with the Shasta Valley Resource Conservation District (SVRCD) and the Siskiyou Resource Conservation District (SQRCD) meet the requirement.
- Beginning in 2005, DFG, in coordination with RCDs and SOSS, initiated outreach efforts to notify agricultural diverters that they could express their interest to participate in one of the permitting programs after they were established by signing a "letter of intent". The letters of intent allowed for the continuation of specified activities under specific provisions while the permitting programs were being developed. Those who chose not to participate were offered options to come into compliance individually.
- The permitting programs were implemented in April 2010.

2. Why are the Resource Conservation Districts involved?

- In 2003, a series of meetings were held to discuss how the permitting programs would be implemented. A key issue was who would hold the master permit and administer the programs. Participants in the meetings included DFG, the Department of Water Resources, Siskiyou County, SOSS and the SVRCD and SQRCD. It was determined that the only entities that could hold the master permit and administer the permitting programs were Siskiyou County or the RCDs. Siskiyou County did not want to compromise its role as an elected local government by holding a state permit that would require that it implement and enforce agency conditions through its local permitting power. After being asked by SOSS to consider taking on this responsibility, the SVRCD and SQRCD Boards of Directors each agreed to be a master permit holder and administer the permitting programs.

3. What are DFG's legal responsibilities to protect fish and wildlife resources?

- DFG is responsible for conserving, protecting and managing California's fish, wildlife and native plant resources. It meets that responsibility by administering and enforcing various statutes in the Fish and Game Code, including section 1600 et seq. and CESA. Implementation of the permitting programs will facilitate agricultural diverters' compliance with section 1600 and CESA. As summarized below, both of those statutes directly apply to water diversions in the Shasta and Scott River watersheds.
- **Lake or Streambed Alteration Agreements (SAA)**
 - Section 1602 of the Fish and Game Code requires notification to DFG of any proposed activity that will substantially modify a river, stream, or lake, whether ephemeral, intermittent or perennial. Specifically, DFG must be notified before any activities are initiated that will:
 1. substantially divert or obstruct the natural flow of any river, stream or lake;
 2. substantially change the bed, channel or bank of, any river, stream or lake;
 3. use any material from the bed, channel or bank of any river, stream or lake; and/or
 4. deposit or dispose of debris, waste or other material containing crumbled, flaked or ground pavement where it may pass into any river, stream or lake.
 - If – after reviewing the notification – DFG determines that the activity may substantially adversely affect fish and wildlife resources, a Streambed Alteration Agreement (SAA) will be required. The SAA will include measures to protect fish and wildlife resources including fish passage (section 5901), bypass flows (section 5937) and water quality (section 5650), as deemed necessary.
 - The SAA component for each permitting programs will consist of separate SAAs issued by DFG to the RCDs and to each permitting programs participant that authorize one or more activities the permitting programs cover, referred to as "covered activities." DFG will include in each SAA those terms and conditions from the "Master List of Terms and Conditions," referred to as the "MLTC," that apply to the covered activities the SAA authorizes.

- **The California Endangered Species Act**

- Fish and Game Code section 2080 (CESA) prohibits the "take"¹ of any state-listed species unless the take is authorized by DFG. Under Fish and Game Code section 2081, DFG may authorize the take of a listed species through the issuance of an incidental take permit (ITP) if certain criteria are met. For example, the take must be incidental to an otherwise lawful activity and any take that cannot be avoided must be fully mitigated.
- Take of coho salmon may occur as a result of actions by individual water diverters (for example, by de-watering a portion of a river or stream or by drawing coho salmon into an irrigation ditch when diverting water which results in their death). By obtaining ITPs (sub-permits) through the permitting programs, agricultural diverters will have authorization from DFG for take of coho salmon that might occur during their routine agricultural operations.

4. Why are we being asked to meet these regulatory requirements?

- Before developing the permitting programs, DFG determined that many agricultural diverters in the Scott and Shasta River watersheds were not in compliance with section 1602 and other Fish and Game Code sections and that in many instances, water diversions were resulting in take of coho salmon. The permitting programs represent an opportunity for agricultural diverters to comply with section 1600 and CESA by obtaining a SAA and sub-permit at a much lower cost compared to obtaining a SAA and ITP through the normal permitting process outside the permitting programs.

5. What steps will DFG take to enforce the permitting programs' requirements?

- DFG is responsible for enforcing the Fish and Game Code on a statewide basis. This includes section 1600 and CESA in the Shasta and Scott River watersheds and elsewhere. In regard to the permitting programs, DFG will enforce those statutes by monitoring permitting program participants' compliance with the terms and conditions of their SAAs and sub-permits. In the event DFG determines that a sub-permittee is not in compliance, DFG will attempt to work with the sub-permittee to correct any violations, but also retains its authority to prosecute any violations.

¹ **"Take"** means to hunt, pursue, catch, capture or kill, or attempt to hunt, pursue, catch, capture or kill. (Fish and Game Code, section 86.)

6. What if all the measures required by the permitting programs are implemented as described and there is no increase to coho salmon populations in the Shasta and Scott River watersheds?

- While many of the protective measures and tasks required pursuant to the permitting programs are identified in the recovery strategy and are intended to promote the recovery of coho salmon, there is no responsibility on the part of the RCDs or other permitting program participants to increase the number of coho salmon (i.e. recover) in the Shasta and Scott River watersheds.

7. What are DFG's objectives for the permitting programs?

- The permitting programs' main objectives are twofold. The first is to provide a means for agricultural diverters in the Scott and Shasta River watersheds to comply with section 1600 for their water diversions and to be covered in the event their routine agricultural operations, including water diversions, result in the take of coho salmon that is simpler and less costly than obtaining a SAA and ITP outside the permitting programs. The second is to implement key coho recovery tasks identified in the recovery strategy by making those tasks part of the permitting programs.

8. This ranch has diverted water from this stream for 130 years and we have never had a SAA for the diversion of water. Why do I need one now?

- Fish and Game Code section 1602 first went into effect on Sept. 15, 1961. Since it was enacted, the statute has required any person who substantially diverts or obstructs the flow of a river, stream or lake to notify DFG. The statute also required that any person who was conducting such an operation prior to Sept. 15, 1961 notify DFG by Dec. 1, 1961. By including that requirement, the Legislature made it clear the statute applied to all existing water diversions regardless of when they commenced. That is, the Legislature intended section 1602 to apply retroactively to such diversions. As a result, any person who has been diverting water before or after September 15, 1961 who has never notified DFG about the diversion or obtained a SAA that covers the diversion remains out of compliance with section 1602.

9. My ranch is not on or near a river or stream. I can't kill a fish. Why does this affect me?

- The location of your ranch is not the critical factor that determines whether you need to comply with section 1600 or CESA. Instead, the critical factor is whether you are conducting a particular activity that "triggers" those statutes. As to ranching operations, in the case of section 1600, the activity is often the diversion of water from a river or stream to the ranch through a ditch. In the case of CESA, such diversions can result in take of coho salmon. Even if the ditch or conveyance is screened to prevent fish from entering, take could still

occur by reducing the amount of water in the stream or river, which could strand juvenile fish, de-water redds, increase stream temperatures beyond lethal limits and/or impede access to suitable rearing habitat by juvenile fish.

10. What are my options?

- As described in more detail below, agricultural diverters in the permitting program areas have two options to choose from in order to come into compliance with section 1600 and CESA: 1) You may participate in one of the permitting programs; 2) You may obtain a SAA and ITP individually through the standard permitting process outside the permitting programs.
 - **Option 1: Participate in either permitting program**

Through this option an agricultural diverter will go through a streamlined notification process for obtaining take authorization pursuant to CESA and a SAA. By participating in one of the permitting programs, the participant will avoid the time and expense required for DFG to prepare a separate environmental document required for the permits. The permitting programs reduce the costs that agricultural diverters would incur under the normal permitting procedures. In addition, the RCDs, not the participants, will be responsible for meeting the participants' mitigation obligations as is more fully described in the last paragraph in item 11 below. Items 11 and 13 more fully discuss participants' costs.
 - **Option 2: Obtain a SAA and ITP through the standard permitting process**

To obtain a SAA through the standard permitting process, you will need to complete a notification package and submit the completed notification and appropriate notification fee to DFG's Northern Region office. DFG will have 30 days to determine if the notification is complete. After the notification is deemed complete, DFG will have 60 days to issue a draft SAA. If the applicant accepts the draft SAA, DFG will need to comply with CEQA before issuing a final SAA. If an environmental document is required, the process will take at least 60 days to complete. The applicant will be responsible for paying a CEQA filing fee (currently \$2,010.25 or \$2,792.25) and DFG's CEQA compliance costs, including the cost DFG incurs to prepare an environmental document. These costs will be in addition to the notification fee (currently between \$224 and \$4,482.75). To obtain an ITP, you will need to submit an ITP application that includes the information described in DFG's CESA regulations (sections 783.2 and 783.3 in title 14 of the California Code of Regulations). After DFG receives the application, it will determine if it is complete. If the application is complete, DFG will begin preparing an ITP. After the ITP is finalized, DFG will need to comply with CEQA, in which case the time periods and costs described above will be the same. Also, you will be solely responsible for implementing all the measures in the ITP to avoid, minimize, and fully mitigate for take of coho.

11. What if I choose to take no action?

- If you have an agricultural diversion in either the Shasta or Scott River watersheds and you choose not to apply for a SAA or ITP, you may be subject to an enforcement action by DFG. A person who violates section 1602 is subject to a civil penalty of up to \$25,000 for each violation and/or a misdemeanor. A person who violates CESA is subject to a misdemeanor. The punishment for a misdemeanor is a fine of up to \$1,000 and/or imprisonment in county jail for up to six months.

12. Who pays for fish screens, fencing, etc?

- Participants in the permitting programs will be responsible for costs incurred to implement avoidance or minimization measures required pursuant to their sub-permits. Avoidance and minimization measures may include bank stabilization, improvements to water diversion structures, reductions in irrigation tailwater, and the implementation of other water efficiency and water management improvement measures.
- DFG and RCDs anticipate that funding will be available through state and federal agencies including the Natural Resources Conservation Service (NRCS), which would reduce the financial burden of permitting program participation on agricultural diverters. In the past, most or all of these costs have been paid for in this way but there can be no assurance that this will continue to be the case in the future.
- The RCDs will be responsible for meeting the participants' obligation to fully mitigate for any take of coho salmon that occurs incidental to conducting their covered activities pursuant to CESA. This aspect of the permitting programs will save agricultural diverters the time and expense of carrying out such activities on an individual basis.

13. Can I withdraw from the permitting program after I join and if so, what will that cost me?

- Yes, you can withdraw at no cost. Permit program participation is voluntary and each permit program includes conditions for relinquishing an SAA and sub-permit after which neither permit will be valid and you will no longer be in compliance with section 1600 and CESA.

14. How much will the RCD charge me?

- The RCDs have determined the amount they need from each permitting program participant to offset their administrative and monitoring costs. Permit program participants will know the amount of the fee prior to making a commitment to participate in the permit program. Please contact your RCD for information.

15. I have decided to pursue a permit. What will happen next?

- The deadline for submitting a complete application for the permit program was July 2, 2010. DFG and RCDs are now processing the notifications and sub-permit applications, and are starting to conduct site visits and develop draft SAAs and sub-permits.
- Fish and Game wardens have begun conducting investigations on the diversions for which DFG has received neither an application to the program nor a standard notification for an SAA.

More information:

- Lake and Streambed Alteration Agreement Program: www.dfg.ca.gov/habcon/1600
- California Fish and Game Commission 2004 Notice of Finding regarding the Recovery Strategy for California Coho Salmon:
www.fgc.ca.gov/regulations/new/2004/nofcohorecovery.pdf